APPEAL NO. 9303

On December 3 and 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), whether the respondent (claimant) was injured in the course and scope of his employment with (employer) on (date of injury), and if so, the extent of such injuries. The hearing officer, finding that a rack of meat cooler shelves with merchandise on them fell on claimant on (date of injury) and resulted in injuries or the aggravation of prior injuries to claimant's right shoulder, back, right knee, and neck, concluded that claimant sustained compensable injuries on that date which extended to and affected his right shoulder, back, right knee, and neck. The appellant (carrier) challenges the sufficiency of the evidence to support certain of the factual findings and legal conclusions, and further asserts error in the admission of three of claimant's exhibits. The claimant's response urges the sufficiency of the evidence, the absence of reversible error, and seeks affirmance of the hearing officer's decision.

DECISION

Finding no reversible error and sufficient evidence to support the challenged findings and conclusions, we affirm.

The hearing officer's decision and order contains a detailed statement of the evidence. We incorporate that statement and find it unnecessary to our decision to recount all that evidence. Succinctly, claimant, then a 40-year-old assistant meat market manager at one of employer's stores, testified--and the hearing officer obviously believed--that on the evening of March 27, 1992, while at the store on his own time to get medicine for his daughter, he heard that employer's district manager had recently been in a meat cooler for which claimant was responsible and was upset at what he observed. Claimant looked in the cooler, observed several discrepancies such as the presence of unauthorized food items and excessive merchandise, and left the store with his daughter. The next morning claimant said he entered the meat cooler to rectify the discrepancies. While in the cooler, a rack of shelves loaded with heavy boxes of meat and other merchandise items fell over on him when he reached for a box of meat. The rack hit claimant in the head, he fell to the cooler floor, and merchandise fell on him. A coworker found claimant lying on the floor, groaning but conscious, and observed merchandise strewn all over the floor. Claimant was taken by ambulance to a hospital, treated, and released the following day. According to claimant, the shelves, which held hundreds of pounds of merchandise, were supposed to have been anchored to the wall, the holes were in the wall for that purpose, but a contractor had apparently overlooked the task. A number of the more relevant details of claimant's testimony concerning his accident were corroborated by statements of coworkers. Claimant admitted to a discussion on March 27th with his supervisor and manager about the poor sales performance of his department, but denied he had been reprimanded.

Claimant complained in the cooler of his neck and jaw hurting, and later at the hospital of pain in his head, jaw, neck, back, and right leg. The evidence showed that

claimant had not had a prior problem with his right knee. However, he had prior problems with his back from an auto accident in April 1988, and with his neck from an auto accident in January 1989. Claimant had also filed two prior workers' compensation claims, the first in August 1991 for an injury to his left elbow and wrist, and the second in October 1991 for a repetitive lifting injury (occupational arthritis) to his right shoulder. Dr. C treated the right shoulder injury. Claimant said his back and neck had not hurt him for over a year before the meat cooler accident but afterwards began to hurt him badly. He also maintained that his right shoulder pain became much worse after the accident and that he underwent surgery on his right shoulder after the accident (April 29, 1992) during which torn muscle tissue, not previously diagnosed, was repaired.

On appeal, the carrier does not specifically challenge factual findings that the meat cooler shelves were not anchored and were unstable, that the shelves with merchandise on them fell on claimant on the morning of (date of injury), and that claimant was furthering employer's business when he was in the cooler at that morning. Carrier does specifically challenge, however, the sufficiency of the evidence to support the following legal conclusions as well as the emphasized portions of the following factual findings:

FINDINGS OF FACT

4.That prior to his scheduled time to be at work and prior to clocking in on the morning of (date of injury), Claimant did go into the meat block cooler of the store where he was employed <u>for the purpose of looking for overages and to straighten the cooler.</u>

6.That Claimant was prompted to go into the cooler <u>as a result of complaints by a supervisor</u> on the previous evening.

9.That as a result of the shelves falling on Claimant, on the morning of (date of injury), <u>he suffered injuries or aggravation to prior injuries to his right shoulder, back, right knee and neck</u>.

CONCLUSIONS OF LAW

3.That the Claimant received compensable injuries on (date of injury).

4.That Claimant's injuries extend to and affect his neck, back, right shoulder and right knee.

The carrier's efforts at the hearing were directed towards showing, first, that the claimant's testimony was inconsistent, contradictory and not credible, and that he staged the accident because he had been reprimanded the previous day. Secondly, carrier

contended that even if the accident on (date of injury) occurred as claimant testified, his right shoulder, back, and neck had been previously injured and were not on (date of injury) injured or reinjured. However, claimant's credibility was a matter for the hearing officer to determine as the fact finder and sole judge of the credibility and weight of the evidence. Article 8308-6.34(e). The hearing officer could believe claimant's testimony, in whole or in part, and notwithstanding any inconsistencies in his testimony or conflicts with other evidence. Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993. Claimant's testimony, as corroborated in part by the testimony of his wife, the statements of coworkers, and various medical records, provided sufficient evidence to support the challenged findings and conclusions.

The carrier objected to the admission of Claimant's Exhibits Nos. 3, 10, and 14. Claimant's Exhibit No. 13 is a September 23, 1992 letter from Dr. C which briefly summarized claimant's x-rays and treatment on (date of injury)th, his discharge on March 29th, his treatment with physical therapy and medications for severe neck and lower back pain, which Dr. C attributed to his (date of injury)th accident, and his need for an MRI of the lower back. Claimant's Exhibits Nos. 10 and 14 are certain medical records of Dr. C pertaining to claimant's right shoulder, both before and after (date of injury). Carrier's objections based on the hearsay rule, a lack of relevance, and the rule of completeness were not well taken. Article 8308-6.34(e) provides that conformity to the legal rules of evidence is not required at contested case hearings. However, carrier's objections that claimant did not exchange those exhibits as required by Article 8308-6.33 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) are more problematical. Claimant's attorney alluded, without contradiction by carrier, to what was apparently a prehearing meeting at the Texas Workers' Compensation Commission's field office in September 1991 and to what he characterized were certain agreements and understandings reached by the parties at that meeting on discovery matters. Both parties mentioned their "designations" of evidence at that meeting. Also, claimant referred to his "statement of evidence" and carrier to its interrogatories, though such documents were not a part of the record. Regrettably, the hearing officer failed to make any record regarding the occurrence and content of such meeting, or the discovery "designations" or agreements reached. The record does show a contested case hearing was scheduled for September 25, 1992 and was continued.

Claimant also urged, without contradiction, that carrier already had Dr. C records in its possession. *See* Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. The hearing officer further failed to ascertain which of Dr. C' records in Claimants' Exhibits Nos. 10 and 14 were either previously exchanged by claimant or already in the carrier's files. Nor did the hearing officer make inquiry to determine whether claimant had good cause for not having exchanged any of such records, assuming one or more had not been exchanged, or were not already in carrier's possession. Instead, the hearing officer simply said the documents were admitted for whatever weight they

merited. We have repeatedly stated that Article 8308-6.33(e) and Rule 142.13(c)(3) require that good cause determinations be made by hearing officers in these situations. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992. It seems obvious that the exclusion of a document for failure to show good cause for its not having been exchanged is not the functional equivalent of admitting the document and then giving it whatever weight the hearing officer ultimately decides it deserves. If a document is not admitted it is obviously not considered. If a document is admitted, however, the weight it is given, if any, must remain a mystery to all but the hearing officer.

The hearing officer erred in admitting Claimant's Exhibits Nos. 3, 10, and 14 without having first determined which of those documents, if any, were not exchanged or not already in the carrier's possession, and without then inquiring and determining whether good cause existed for any demonstrated failure of claimant to have exchanged them. However, we find in this case that such error is not reversible. We have carefully perused the records in question and are satisfied that the salient information they contain is largely cumulative of other evidence including claimant's testimony, his wife's testimony, and other medical records in evidence. We are also satisfied that the admission of these documents did not probably result in an erroneous decision by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, and Texas Workers' Compensation Commission Appeal No. 92431, decided October 5, 1992.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge